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In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

BILLY G. YOUNG

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a prosecutor may rebut closing defense argument impugning the integrity of the prosecution and asserting that the prosecutors themselves do not believe in the defendant's guilt by responsive argument that would be inappropriate in the absence of such provocation.

2. Whether the court of appeals erred in reversing on the basis of the prosecutor's remarks when respondent did not object to the remarks at trial.

3. Whether, assuming the prosecutor's remarks were improper, the court of appeals erred in failing to determine whether they constituted harmless error.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-11a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1983. A petition for rehearing with suggestion of rehearing en banc was denied on June 20, 1983 (App. B, *infra* 12a). On August 12, 1983, Justice White extended the time to petition for a writ

of certiorari to and including September 18, 1983 (a Sunday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Western District of Oklahoma, respondent was convicted on nine counts of mail fraud, in violation of 18 U.S.C. 1341, and three counts of making false statements to a government agency, in violation of 18 U.S.C. 1001.[1] He was sentenced to two years' imprisonment and fines of $39,000. The court of appeals reversed (App. A, *infra*, 1a-11a).

1. The evidence at trial showed that respondent, vice president and general manager of Compton Petroleum Corporation ("Compton") in Abilene, Texas, contracted in 1976 and 1977 to deliver quantities of Oklahoma "sweet" crude oil[2] to the Apco Oil Corporation ("Apco") refinery at Cyril, Oklahoma. Some 205,000 barrels of oil were delivered between January and September, 1977, but approximately 117,250 barrels consisted of fuel oil, an already refined product different from and less valuable than crude oil. Compton's invoices accompanying those deliveries falsely certified that all the oil was crude

[1] Prior to trial, the government dismissed one other mail fraud count, and at the close of the evidence, the district court granted a judgment of acquittal on a second mail fraud count. The jury acquitted respondent on one count of interstate transportation of stolen property (18 U.S.C. 2314). Compton Petroleum Corporation was also indicted with respondent. Prior to trial, the district court accepted the corporation's nolo contendere plea to the indictment and imposed a fine (App. A, *infra*, 3a).

[2] Crude oil is a liquid hydrocarbon in its natural state. "Sweet" crude oil has a low sulfur content.

oil. Apco relied on those false certifications and reported to the Federal Energy Administration, in compliance with government regulations, the amount of crude oil it thought it was refining each month. The FEA in turn relied on Apco's reports to determine the national averages of tier categories of refined oil for purposes of equalizing the cost of crude oil under its entitlements program (App. A, *infra*, 2a-3a).

In December 1976, respondent agreed with Hugh Bradley, Apco's vice president of supply and transportation, to increase the amount of crude oil that Compton was delivering to Apco's Cyril refinery. Shortly afterward, respondent and Bradley signed a contract formalizing that agreement; they later amended the agreement to make it automatically renewable each month (Tr. 351-353, 508-511).

Although respondent caused certain amounts of crude oil to be delivered to Apco in compliance with the contract, he used other means of supply for the remainder of the oil deliveries. In the same period that respondent spoke with Bradley, respondent suggested an arrangement with Kenneth Ross, a longtime friend and business associate (Tr. 339-340). Ross owned Prime Resources Corporation, an oil brokerage firm (Tr. 303, 318-320). Under respondent's plan, Ross was to secure fuel oil and falsely certify that it was crude oil; in turn, respondent would have Compton pay Ross a 10¢ per barrel commission as a fee for the recertification (Tr. 323, 339-340). Ross fulfilled his agreement; he began to buy fuel oil from Producer's Crude, Inc., an Abilene, Texas oil reseller. The invoices from Producer's Crude to Prime Resources accurately stated that fuel oil was transferred, but Prime Resources' invoices to

Compton for the same oil certified that crude oil was sold (Tr. 180, 253-254, 272, 306-311, 320-321, 421-423).[3]

The fuel oil was delivered from the refinery to two holding tanks in Compton's yard in Abilene (Tr. 49, 84-90, 97, 125, 137-138, 156). To make it appear that the tanks contained crude oil, Compton's truck dispatcher painted a crude oil lease number on the tanks (Tr. 99-101, 140-141). Several Compton truck drivers then reloaded the fuel oil into Compton trucks and delivered it to the Apco refinery in Cyril (Tr. 96, 107-111, 120-121, 124, 135-137, 153-155, 160, 165-66). Though Compton's drivers normally performed two simple tests on crude oil obtained from a lease site, they were told that it was not necessary to perform any tests on the oil taken from the tanks in Compton's yard (Tr. 52-53, 105-106, 129, 144).[4]

At Apco's Cyril refinery, the Compton drivers emptied their fuel oil into a lease automatic custody

[3] Producer's Crude bought the fuel oil from another Abilene concern, Pride Refinery (Tr. 421-423). Respondent's nephew, Mike Rawlings, who worked for Producer's Crude, transported the fuel oil from the refinery to Compton's yard in Abilene, a little over three miles away. Rawlings made between two and six round trips per day, thereby hauling twenty to twenty-five thousand barrels of fuel oil each month from March through September, 1977 (Tr. 84-90). Before Rawlings' tenure, some loads of fuel oil were moved by Compton drivers directly from the Pride refinery to Apco at Cyril (Tr. 131, 163-164, 166-167).

[4] Those tests are known in the trade as "shakeouts." A small quantity of crude oil is placed in a device which measures its relative weight in degrees. This is referred to as the "gravity" of the oil. In addition, the crude oil's basic sediment and water (BS&W) content is measured (Tr. 47, 52-53, 105).

transfer ("LACT") unit. The LACT unit, which was not manned, automatically measured the number of barrels in each delivery. It also collected a small sample of each barrel for later testing (Tr. 47, 375-377). Such testing would reveal, *inter alia*, the relative weight—known as "gravity"—of the oil. A high gravity crude oil, in the 35° to 40° gravity range, yields greater quantities of gasoline and diesel fuel after refining than does a lower gravity crude oil, which yields more fuel oil and asphalt (Tr. 400-405, 414).[5] Apco wanted a high gravity crude for gasoline production (Tr. 357, 400-403).

Because fuel oil has a low gravity, respondent made arrangements to conceal what he was supplying. He had Compton's crude oil trader purchase from two other companies quantities of condensate, a high gravity liquid taken from the well heads of natural gas wells. The condensate was delivered to a Compton storage station at Chickasha, Oklahoma (Tr. 51, 53-54, 64-66, 80, 179). Compton drivers later moved the condensate to the LACT unit at Apco's Cyril refinery (Tr. 123-125, 130, 155). Since the condensate's gravity was 60° or higher, its blending with the fuel oil in the LACT unit resulted in an increase in the gravity measurement of the oil stream (Tr. 52, 56, 76).

Respondent's scheme was common knowledge among the Compton truck drivers who delivered fuel oil to Apco (Tr. 121, 157-158). Other Compton employees were not as knowledgeable. When Kenneth Fuller, Compton's operations manager and respondent's second in command, discovered that fuel oil was being delivered to Apco, he confronted respondent, who

[5] Fuel oil comes from the "bottom of the barrel" and is not a profitable product for a refinery (Tr. 422, 424).

replied that there was "no problem" with such deliveries (Tr. 72-73, 76-77). And in April 1977, Homer Reves, Compton's chief accountant, told another employee that something was not right about the Apco transaction, because Compton was buying oil from Prime Resources yet was paying a second company for most of the oil (Tr. 201-202). On one occasion, L. K. Bird, another Compton accountant, received an invoice from Prime Resources for "burned fuel" rather than crude oil. Bird showed the invoice to Reves, who said that fuel oil was being delivered to Apco contrary to the terms of Compton's contract with Apco. Reves also said that he believed that Prime Resources was being paid a fee for changing the certification concerning the oil (Tr. 251, 261-262). Reves returned the fuel oil invoice to Prime, and he later received in its place an invoice for crude oil (Tr. 268-269).[6] In addition, Judy Boeshart, a Compton production supervisor, heard respondent tell another Compton employee that fuel oil would be invoiced through Ken Ross, who would change the certifications to reflect crude oil instead. Ross's fee for this service was to be 10¢ per barrel (Tr. 273-274).

Despite the growing numbers of persons at Compton who were aware of respondent's scheme, Apco was slow to discover it. Not until September 1977, as the result of an investigation prompted by another company's delivery of fuel oil, did Apco determine that

[6] After the instant investigation began, Kenneth Ross and his wife Jerit, who had prepared the invoices containing false certifications that crude oil was sold, substituted in Prime Resources' files new invoices that correctly stated that fuel oil had been sold (Tr. 306-307, 320-322).

respondent also was furnishing fuel oil. Later in September, a sample was taken from the LACT unit used by Compton, and an Apco laboratory technician performed a distillation test on that sample.[7] The technician's conclusion was that the oil provided by respondent was not crude oil (Tr. 354-355, 368, 378-379, 403-405). On learning of the test results, Don Heavin, Apco's pipeline superintendent and a friend of respondent, called respondent and asked if he was delivering virgin crude oil. Respondent said that he was (Tr. 379).[8] Heavin reported the test results to Hugh Bradley, and afterwards the Compton deliveries decreased (Tr. 354-355, 378-381).[9] Because of respondent's fraudulent delivery of a fuel oil/condensate mixture, Apco needlessly spent time and money duplicating the refinement of already refined fuel oil. In addition, the refining process produced too much fuel

[7] A distillation test is more complicated than the simple gravity and BS & W tests that normally were performed (Tr. 368, 376).

[8] Earlier, when the other company's fuel oil delivery was discovered, Hugh Bradley of Apco called respondent and asked if respondent likewise was delivering fuel oil. Respondent assured Bradley that he knew nothing about deliveries of fuel oil (Tr. 358).

[9] In March 1979, two FBI agents interviewed respondent as part of an investigation into allegations that various companies had sold fuel oil to Apco in 1977 and had falsely certified that it was crude oil (Tr. 291-293). Respondent told the agents that Compton had sold oil to Apco in 1977, but he maintained that he had sold virgin crude oil, not fuel oil certified as crude. Respondent also told the agents that if he had discovered that Compton was selling fuel oil, he would have immediately terminated the deal (Tr. 294).

oil for Apco's needs and an insufficient amount of gasoline (Tr. 357, 378, 403).[10]

2. In his own defense, respondent admitted that he had knowingly purchased fuel oil from Prime Resources, but he claimed that he thought that such fuel oil could legitimately be certified as crude oil. He based this contention on his knowledge that crude oil had been sold in the past as fuel oil, from which he concluded that the reverse could be true. Alternatively, he said that he believed that if condensate were blended with fuel oil, the result would be the equivalent of a barrel of crude oil (Tr. 477-478, 484, 527).[11] Because he had received no complaint from Apco prior to September 1977, he said that he believed that Apco was pleased with the stream of oil he was supplying (Tr. 495). Respondent admitted that he had lied to Heavin, Bradley, and the FBI agents by saying that he had not sold fuel oil to Apco (Tr. 487, 496-497, 515-518), but he maintained that the composite stream of oil he had provided to Apco was better than what Apco otherwise was receiving (Tr. 494).

[10] Throughout this period, Apco filed monthly reports with the FEA concerning the amounts of crude oil that Apco thought it was refining (Tr. 431, 434). Using those reports and similar ones filed by other crude oil refiners, the FEA determined the average monthly price of crude oil per category. Those refiners who had access to cheaper oil then had to purchase entitlements, *i.e.*, pay into a fund, while those who paid more than the national average received rebates from this fund. The purpose of the entitlements program was to equalize the cost of crude oil among all refiners nationwide (Tr. 370-371, 431-433). Refiners were not suposed to report fuel oil that they received, and they were not entitled to any compensation for purchases of fuel oil (Tr. 433-434, 439-440). The Apco official in charge of regulatory compliance testified that the company would have to return the entitlements payments it received in connection with the fuel oil deliveries (Tr. 440).

[11] An Apco chemist had previously testified, however, that condensate—the additive respondent relied on to support his claim that his stream of oil was equivalent to crude oil—had very little use in the refining process and did not yield useful products (Tr. 416-417).

3. In closing argument, the prosecutor summarized the evidence against respondent. Respondent's attorney began his own summation by arguing that respondent's case had been presented unfairly by the prosecution, and that "[f]rom the very beginning" to "this very moment," the government had attempted to "poison [the jury's] minds unfairly" (Tr. 542). He went on to charge the prosecution with "reprehensible" conduct in purportedly attempting to cast a false light on respondent's conduct (Tr. 543). Defense counsel also pointed to the prosecution table and said, "I submit to you that there's not a person in this courtroom, including those sitting at this table, who think that [respondent] intended to defraud Apco" (Tr. 543-544). Finally, near the conclusion of his argument, respondent's attorney said that respondent had been the only person in the case who had acted with "honor and integrity" (Tr. 547).

In rebuttal, the prosecutor responded to defense counsel's claim that the government did not believe in its own case by saying (App. A, *infra*, 9a; Tr. 549):

> I think [defense counsel] said that not anyone sitting at this table thinks that [respondent] intended to defraud Apco. Well, I was sitting there and I think he was. I think he got 85 cents a barrel for every one of those 117,250.91 barrels he hauled and every bit of the money they made on that he got one percent of. So, I think he did. If we are allowed to give our personal impressions since it was asked of me.

After reviewing some of the evidence against respondent, the prosecutor then said, "I don't know what you call that, I call it fraud. You can look at the evidence and you can remember what they said and what he admitted they said. I think it's a fraud" (App. A, *infra*, 9a; Tr. 549-550).

Government counsel also responded to defense counsel's claim that Apco had not suffered any loss in the FEA's entitlement program; the prosecutor said that he thought that Apco would have to make some kind of restitution (App. A, *infra*, 9a-10a; Tr. 550-551). Finally, the government attorney addressed counsel's claim that only respondent had acted with honor and integrity. The prosecutor briefly reviewed some of respondent's conduct and suggested that such conduct did not constitute honor and integrity and that the jury would not be doing its duty by ignoring the court's instructions and acquitting on such a concept (App. A, *infra*, 10a; Tr. 552). Respondent's attorney did not object to any of these statements.

4. Despite respondent's failure to object at trial, the court of appeals held that the prosecutor's statements constituted misconduct and warranted reversal (App. A, *infra*, 10a). The court rejected the government's argument, based on this Court's decision in *Lawn* v. *United States*, 355 U.S. 339, 359 n.15 (1958), that the prosecutor's statements were invited by respondent's attorney's own arguments. The court said instead that "the rule is clear in this Circuit that improper conduct on the part of opposing counsel should be met with an objection to the court, not a similarly improper response" (App. A, *infra*, 11a). Judge McWilliams dissented without opinion (*ibid.*).

The court also denied the government's rehearing petition by the same vote (App. B, *infra*, 12a).

In that petition, the government argued that the court of appeals had erred in not considering whether the prosecutor's statements were harmless in light of the total record, particularly since there was overwhelming proof of respondent's guilt. In connection with that argument, the government called the court's attention to this Court's then pending consideration of a similar issue in *United States* v. *Hasting*, No. 81-1463 (May 23, 1983).[12] In addition, the government argued that the court of appeals had erred in finding the prosecutor's arguments to be "plain error" when respondent's counsel's failure to object had deprived the district court of an opportunity to remedy any purported error. Finally, the petition noted that the decision below appeared to be inconsistent with this Court's decision in *Lawn*, *supra*, and other court of appeals' decisions after *Lawn*. The court denied rehearing without opinion (App. B, *infra*, 12a).

REASONS FOR GRANTING THE PETITION

Defendant's convictions for mail fraud and making false statements to a government agency were reversed by a divided panel of the court of appeals on a finding that certain comments made by the prosecutor during rebuttal argument, though not objected to at trial, were plain error. The comments were in direct response to improper remarks by defense counsel placing the good faith of the prosecution in issue. The court held that the prosecution has no right of reply to improper defense remarks. The court made no finding of prejudice to the defendant, and did not address the government's argument that the comments, if error, were harmless. The decision

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[12] *Hasting* was decided before rehearing was denied below.

thereby directly conflicts with decisions of this Court concerning a prosecutor's right to reply to improper arguments by the defense (*Lawn* v. *United States*, 355 U.S. 339, 359 n.15 (1958)), the defendant's obligation to object to improper remarks by the prosecutor at trial (*United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940)), and the appellate courts' duty to consider whether any trial error is harmless (*United States* v. *Hasting*, No. 81-1463 (May 23, 1983)).

The decision of the court of appeals has serious implications for the administration of the criminal justice system in the federal courts, conflicts with numerous decisions of other circuits, and warrants review by this Court.

1. In *Lawn*, 355 U.S. at 359-360 n.15, this Court held that a defense counsel's closing argument that attacked the government's good faith in bringing the prosecution and accused two key government witnesses of being perjurers "clearly invited the [prosecutor's] reply," in which the government vouched for the witnesses' credibility.[13] Most courts of appeals have followed *Lawn* and have held that a prosecutor's arguments made in response to attacks by defense counsel in closing argument do not constitute reversible error. *E.g.*, *United States* v. *Trujillo*, No. 82-6036 (11th Cir. Sept. 9, 1983); *United States* v. *Harrison*, No. 82-5031 (4th Cir. Sept. 6, 1983); *United States* v. *West*, 670 F.2d 675, 688-689 (7th

[13] Similarly, in *Socony-Vacuum Oil Co.*, this Court recognized the legitimacy of prosecutorial comments vouching for the government's belief in the defendant's guilt, as a "rebuttal" to defense arguments placing the government's views at issue (310 U.S. at 242), though in that instance the Court found that the particular comments "overstep[ped] the bounds" (*ibid.*).

Cir.), cert. denied, 457 U.S. 1124 (1982); *United States* v. *Flaherty*, 668 F.2d 566, 598 (1st Cir. 1981); *United States* v. *Tham*, 665 F.2d 855, 862 (9th Cir. 1981), cert. denied, 456 U.S. 944 (1982); *United States* v. *Schwartz*, 655 F.2d 140, 142 (8th Cir. 1981); *United States* v. *Praetorious*, 622 F.2d 1054, 1060-1061 (2d Cir. 1979), cert. denied, 449 U.S. 860 (1980); *United States* v. *Isaacs*, 493 F.2d 1124, 1164-1165 (7th Cir.), cert. denied, 417 U.S. 976 (1974); *United States* v. *LaSorsa*, 480 F.2d 522, 526 (2d Cir.), cert. denied, 414 U.S. 855 (1973); *United States* v. *Sullivan*, 421 F.2d 676, 677 (5th Cir. 1970) (per curiam); *United States* v. *Hoffa*, 349 F.2d 20, 50-51 (6th Cir. 1965), aff'd on other grounds, 385 U.S. 293 (1966). See also ABA, Standards for Criminal Justice 3-5.8, commentary at 3.91 (1980) ("[A] prosecutor may be justified in making a reply to an argument of defense counsel that may not have been proper if made without provocation.").

The prosecutor's statements in this case fall easily within the government's right of reply recognized in *Lawn*. As in *Lawn*, it was defense counsel who raised the issue of the prosecutor's personal beliefs. In his closing argument, respondent's counsel asserted that "there's not a person in this courtroom including those sitting at this table [the prosecutors] who think that Billy Young intended to defraud Apco" (Tr. 543-544).[14] Having placed the prosecutor's good faith in issue, respondent opened the door for the prosecutor's direct response (Tr. 549, 550):

[14] The comment by defense counsel in *Lawn* was similar: "that the United States Attorney and his assistant in charge of the case 'had been instructed, or in my opinion they never would have done this' " (355 U.S. at 359-360 n.15).

> I think he said that not anyone sitting at this table thinks that Mr. Young intended to defraud Apco. Well, I was sitting there and I think he was. I think he got 85 cents a barrel for every one of those 117,250.91 barrels he hauled and every bit of the money they made on that he got one percent of. So, I think he did. If we are allowed to give our personal impressions since it was asked of me.
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> * * * * *
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> I don't know what you call that, I call it fraud. You can look at the evidence and you can remember * * * what they said and what he admitted they said. I think it's a fraud.

Similarly, the prosecutor's comments on respondent's "honor and integrity" and his reminder to the jury that their duty is "in finding facts as opposed to the law" (Tr. 552) were in response to defense counsel's argument to the jury that respondent was "the only one in this whole affair that has acted with honor and integrity" and that "[t]hese complex economic regulations should not have any place in an effort to put someone away" (Tr. 547).

Under these circumstances, "the prosecutor was certainly entitled to reply with rebutting language suitable to the occasion." *United States* v. *LaSorsa*, *supra*, 480 F.2d at 526. As the Second Circuit has stated, "in light of the fact that the defense lawyers attacked the credibility and honesty of the Government's case in their closings, the Government's statements * * * were understandable if not laudable." *United States* v. *Perry*, 643 F.2d 38, 51 (2d Cir.), cert. denied, 454 U.S. 835 (1981).

The court of appeals appeared to recognize that the defense comments were "improper conduct" (App. A, *infra*, 11a), but it nevertheless refused to apply

this Court's holding in *Lawn*.[15] Instead, the court followed the Tenth Circuit's line of cases, developed without reference to *Lawn*, which holds that "even if improper argument is made by defense counsel, the door is not thereby opened to similar conduct by the prosecution." See *United States* v. *Rios*, 611 F.2d 1335, 1343 (1979); *United States* v. *Latimer*, 511 F.2d 498, 503 (1975); *United States* v. *Ludwig*, 508 F.2d 140, 143 (1974).[16] Indeed, the court below emphasized the per se nature of its rule when it said (App. A, *infra*, 11a) that "the rule is clear in this Circuit that improper conduct on the part of opposing counsel should be met with an objection to the court,

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[15] The government's brief on appeal expressly relied (Br. 15) on *Lawn* for its argument that the rebuttal comments were invited by defense counsel's statements in his summation. The court of appeals did not cite *Lawn*, but simply followed contrary Tenth Circuit precedent.

[16] The Tenth Circuit's current position evolved indirectly, through dictum, without citation to *Lawn* or to decisions of any other circuit. The rule was first announced in *Ludwig* (508 F.2d at 143). However, the government in *Ludwig* did not argue that the prosecutor's comments at issue were a permissible response to defense comments, but conceded they were in error. The government's argument—rejected by the court—was that the error was harmless "in view of numerous complaints directed against defense counsel's own conduct" (*ibid.*). In *Latimer*, the court faced the issue of improper response to a *proper* argument by the defense (see 511 F.2d at 503), quoting the *Ludwig* rule in dictum. Finally, in *Rios*, the court concluded that the record did not support the government's claim that the prosecutor's comment was in response to the defense (611 F.2d at 1343). Thus, the court's statement of the general rule against a prosecutor's right to reply (*ibid.*) was dictum. The instant case is apparently the first in which the rule has been employed in clear contravention of *Lawn*.

not a similarly improper response." This per se rule clearly conflicts with this Court's decision in *Lawn* and with the rule generally followed by the other circuits; it should be corrected.[17]

2. Even assuming arguendo that the court below was correct in finding that the prosecutor's rebuttal argument was improper, the court was still wrong in finding that those comments, which were not objected to at trial, were proper grounds for reversal on appeal. This Court has held that "counsel for the defense cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial." *Socony-Vacuum*, 310 U.S. at 238-239; see *Crumpton* v. *United States*, 138 U.S. 361, 364 (1891). The "plain error" exception to this rule, set out in Fed. R. Crim. P. 52(b), must "be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *United States* v. *Frady*, 456 U.S. 152, 163 n.14 (1982). If a defendant has failed to object to the prosecutor's statements to the jury at the time they were made, an appellate court may not reach an error contained in them unless it is ' "obvious' " or if it would " 'otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings.' " *Socony-Vacuum*, 310 U.S. at 239,

[17] Moreover, we dispute the court of appeals' apparent assumption that an objection is as effective as a response in nullifying the impropriety of the defense argument. Advice to the jury that the defense argument is improper, while chastising counsel, does not answer the factual assertion of prosecutorial hypocrisy made in such an argument. In our view, fairness requires that the prosecution itself be permitted to respond.

quoting *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936); accord, *Frady*, 456 U.S. at 163 n.13.

The court of appeals apparently concluded that the prosecutor's comments in this case constituted "plain error" simply on the ground that the subject of improper prosecutorial comments had been addressed frequently and forcefully by that court on previous occasions (App. A, *infra*, 10a):

> Considering the position of this Court on the issue of prejudicial statements made by the prosecution during argument to the jury, the above-quoted remarks were sufficiently egregious as to constitute plain error. Thus, the failure of Mr. Young's counsel to enter an objection at the time they were made is not fatal to this appeal.

In fact, however, plain error cannot be found on the basis of the nature of the error alone; "each case necessarily turns on its own facts" (*Socony-Vacuum*, 310 U.S. at 240). Here, the court of appeals failed to consider whether the error, if it was error, "affect[ed] substantial rights" of the respondent. See Fed. R. Crim. P. 52(b). The court made no showing whatever that, in the context of this trial, respondent was prejudiced by the remarks.[18] After all, the trial court cautioned the jury at the beginning of trial that arguments of counsel were not evidence (Tr. 21), and, as we have shown, the prosecutor could properly—even if erroneously—have believed that his responses were sanctioned by *Lawn*. Consequently, appellate consideration of the prosecutor's comments, which were not obviously prejudicial and which respondent did not see fit to mention at trial, was unwarranted under the doctrine of plain error. Respondent's fail-

[18] We show in Point 3, *infra*, that the prosecutor's remarks could not reasonably be found to have been prejudicial to respondent.

ure to object at trial should have been held fatal to his claim. *United States* v. *Perry, supra*, 643 F.2d at 51; *Whitehorn* v. *United States*, 380 F.2d 909, 913 (8th Cir. 1967).

A closing argument is a particularly inappropriate area in which to disregard the requirement of a timely objection. The impact on the jury and attendant prejudice to the defendant depend to a large extent on factors such as tone, gestures, and emphasis, not perceptible on the cold record before an appellate court. Because of these factors, the judge and counsel at trial are in the best position to assess whether prejudicial error has occurred. But here neither the district court nor respondent's attorney saw anything improper in the prosecutor's statements at the time they were made. That casts considerable doubt on the proposition that the statements were so egregious that they led to a "miscarriage of justice" (*Frady*, 456 U.S. at 163). Appellate consideration of a trial court error such as this, which is not obviously prejudicial and which the defense did not mention at trial, has been condemned by this Court as "extravagant protection." *Henderson* v. *Kibbe*, 431 U.S. 145, 154 n.12 (1977); *Namet* v. *United States*, 373 U.S. 179, 190 (1963).

Moreover, reversal of a conviction on the basis of prosecutorial comments not objected to at trial undermines the purpose of the contemporaneous objection requirement. As this Court has noted, "[o]rderly procedure requires that the respective adversaries' views * * * be presented to the trial judge in time to enable him to deliver an accurate charge and to minimize the risk of committing reversible error" (*Henderson* v. *Kibbe*, 431 U.S. at 154).[19] As one judge has observed:

[19] Cf. *Wainwright* v. *Sykes*, 433 U.S. 72, 90 (1977). ("Any procedural rule which encourages the result that [trial court] proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification".)

> [C]ounsel have a duty to the court, an obligation at least to permit the judge to conduct a trial that finally determines the question at issue. A defendant may not remain silent in response to error and take his chances with the verdict before moving for a mistrial. Nor may he permit error to go unchallenged, then ask the appellate court to reverse the conviction.

United States v. *West*, 680 F.2d 652, 658 (9th Cir. 1982) (Wright, J., concurring). This point has special force in the case of curable errors. Had defense counsel in this case lodged an objection at trial, the district court would have been able to give a cautionary instruction to the jury, thereby curing any error that might otherwise have occurred. *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 644 (1974).[20] Since respondent's attorney did not object, however, the trial court had no occasion to issue an instruction. For

[20] In *Donnelly* the Court considered the prejudicial impact of an improper closing argument by a prosecutor, who had stated that the defendant hoped that the jury would find him guilty of something other than first degree murder (416 U.S. at 640). Because the prosecutor and the trial judge had cautioned the jury that the argument was not evidence, and because the trial court had given a cautionary instruction in response to the defendant's objection, this Court did not find the argument to justify reversal of the conviction on habeas review. The Court observed that "[a]lthough some occurrences at trial may be too clearly prejudicial for such a curative instruction to mitigate their effect, the comment in this case is hardly of such character" (*id.* at 644). If the argument in *Donnelly* was capable of being cured by a cautionary instruction, then the remarks in question here should certainly be considered susceptible to correction.

the court of appeals to reach respondent's claim notwithstanding his failure to object, in the absence of a showing that the prosecutor's comments caused a miscarriage of justice, frustrates the purposes of the contemporaneous objection requirement. *United States* v. *Briggs*, 457 F.2d 908, 912 (2d Cir.), cert. denied, 409 U.S. 986 (1972); *United States* v. *Kravitz*, 281 F.2d 581, 587 (3d Cir. 1960), cert. denied, 364 U.S. 941 (1961).

This Court has observed that "[i]t is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court" (*Henderson* v. *Kibbe*, 431 U.S. at 154). It should be even rarer to find an instance in which a prosecutor's argument, not objected to at trial, justifies reversal. Not only is the error as easily correctible at trial as is the jury instruction (see *Donnelly* v. *DeChristoforo*, 416 U.S. at 644), but it is *less* susceptible to accurate assessment on an appellate record, and *less* likely to be prejudicial to the defendant. "Isolated passages of a prosecutor's argument, billed in advance to the jury as a matter of opinion not of evidence," do not reach the proportions of a miscarriage of justice. See *id.* at 646; *United States* v. *Foster*, 711 F.2d 871, 883 (9th Cir. 1983).

3. The court of appeals reversed respondent's conviction without any determination whether respondent was prejudiced by the prosecutor's statement or whether, in the context of the total record, the challenged argument could be deemed to be harmless error. In *United States* v. *Hasting* this Court made clear that "it is the duty of a reviewing court to consider the trial record as a whole and to ignore errors that are harmless, including most constitutional violations" (slip op. 9; see also *id.* at 10 n.7). The decision clarified and reaffirmed a principle of long standing. See, *e.g.*, *Brown* v. *United States*, 411 U.S. 223, 230-232 (1973); *Milton* v. *Wainwright*, 407 U.S. 371 (1972); *Harrington* v. *California*, 395 U.S. 250 (1969); *Chapman* v. *California*, 386 U.S. 18, 21-22 (1967). The Court in *Hasting* held that the requirement of appellate "consideration of the entire record prior to reversing a conviction" applies to all "errors that may be harmless" (slip op. 10 n.7), a category that undoubtedly includes improper summation arguments by the prosecutor, as *Hasting* itself bears out.[21] See also, *e.g.*, *Socony-Vacuum*, 310 U.S. at 242; *United States* v. *Foster*, 711 F.2d at 883; *United States* v. *Flaherty*, 668 F.2d at 598. The decision below thus is in clear violation of the requirement that any adjudication of error be accompanied by a harmless error analysis.[22]

The failure of the court of appeals to consider whether the prosecutor's comments prejudiced respondent's "substantial rights," as required under Fed. R. Crim. P. 52(b), exacerbates its disregard for the need to consider the possibility that the error,

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[21] *Hasting* concerned a prosecutor's reference during summation to the defendants' failure to testify.

[22] The decision below is also, we submit, in violation of 28 U.S.C. 2111, which provides that "[o]n the hearing of any appeal * * *, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties," and of Fed. R. Crim. P. 52(a), which provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."

if any, was harmless. The bare finding of "plain error," with no discussion of actual prejudice to the defendant, no more establishes the existence of prejudice than does a straight reversal accompanied by no consideration of the harmlessness of the error (as in *Hasting*). Indeed, the fact that the error complained of was not objected to at trial heightens the appellate court's obligation to consider the trial record as a whole before reversing. When no prejudice was apparent to the participants during the trial, an appellate court surely bears a special responsibility to assay the record and weigh the consequences of the perceived error before reversing and requiring a retrial.

While this Court, if it concludes that there was error and that the failure to object was not fatal to respondent's claim, may prefer to remand to the court of appeals for consideration of the harmfulness of the error of the prosecutor's comments, we believe that there can be no question that the prosecutor's comments did not substantially prejudice appellant's rights in the circumstances of this case. First, the trial court cautioned the jury at the outset of the trial that the lawyers' arguments were not evidence. Second, the jury was undoubtedly aware that the prosecutor was an advocate and thus likely discounted much of his argument as the viewpoint of a party to the litigation. See *Donnelly* v. *DeChristoforo*, 416 U.S. at 640 n.7. Finally, and most importantly, the evidence against respondent was overwhelming. Not a single witness supported his defense that fuel oil mixed with condensate is equivalent to crude oil, and several witnesses expressly disavowed that position. It was beyond question that respondent failed to advise Apco of what he actually was supplying

and that the oil he supplied did not meet the requirements of his contract. Moreover, the evidence conclusively showed that respondent engaged in activities to conceal his scheme; he used an intermediary to recertify the fuel oil as crude oil, furnished a quantity of condensate each month to raise the gravity level of the oil he supplied to Apco, and concededly lied in response to inquiries from both Apco and government investigators. Under those circumstances, there was clear evidence of respondent's guilt. Cf. *Socony-Vacuum*, 310 U.S. at 239-240.

Not only was there strong evidence of respondent's guilt, but the error of the prosecutor's remarks was at most exceedingly marginal. As we have pointed out, the comments with which the court of appeals found fault were in fact prompted by defense counsel's own argument. Even if we are wrong in the view that the argument was fair response, it is scarcely possible that the prosecutor's remarks could have materially influenced the verdicts against respondent. The prosecutor's statements concerning his belief that a fraud had been committed were nothing more than a statement of the obvious.[23] And his statement that Apco might well have to make restitution under the entitlements program was supported by the evidence (see Tr. 440). Finally, the prosecu-

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[23] Ordinarily, the principal risk of prejudice from prosecutorial assertions of personal belief in a defendant's guilt arises from the possibility that the jury will infer from such comments the prosecutor's possession of other information, not placed in evidence at trial, supporting such a conclusion. See *United States* v. *Roberts*, 618 F.2d 530, 533 (9th Cir. 1980), cert. denied, 452 U.S. 942 (1981); *United States* v. *Greer*, 467 F.2d 1064, 1072 (7th Cir. 1972), cert. denied, 410 U.S. 929 (1973). In the circumstances of the instant case, there plainly was no such danger.

tor's ambiguous statement urging the jury not to acquit on a basis contrary to the trial court's instructions and contradicting defense counsel's claims that respondent alone had acted with honor appear responsive to what amounted to a defense plea for jury nullification and could not have prejudiced respondent.

No citation of authority is needed for the proposition that the federal criminal justice system is overburdened, and that the scarcity of resources threatens the interests both of society and of criminal defendants as a class. A decision such as the instant one, by requiring retrial of a case on account of unobjected-to "error" that carried with it little potential for prejudicing the defendant's right to a fair trial and an accurate verdict, further burdens the system. The decision is especially difficult to justify because it was reached without consideration of the principles laid down in numerous decisions of this Court, and generally followed by the other courts of appeals, regulating disposition of issues of the sort presented by this case. Under the circumstances, the Court can, we believe, make a material contribution to the fair and efficient administration of federal criminal justice by undertaking review of this case. And because the principles that govern the disposition of the issues presented herein appear to be relatively well settled, the Court may deem summary reversal appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1983

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 81-1536

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

BILLY G. YOUNG, DEFENDANT-APPELLANT

[Filed Feb. 22, 1983]

Appeal from the United States District Court
For the Western District of Oklahoma

(D.C. CR-80-175-E)

Before SETH, and MCWILLIAMS, Circuit Judges, and BRIMMER *, District Judge *

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* Of the United States District Court for the District of Wyoming, sitting by designation.

PER CURIAM

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R. App. P. 34(a); Tenth Circuit R. 10(e). The cause is therefore ordered submitted without oral argument.

Appellant Young, as vice-president and general manager of Compton Petroleum Corporation (Compton Petroleum), entered into a contract to sell crude oil to Apco Oil Corporation in late 1976. Deliveries under the contract were made between January 1977 and September 1977; but what Apco Oil Corporation actually received from Compton Petroleum consisted of a mixture of fuel oil and condensate crude oil, even though the product had been designated and certified throughout as low sulpher [sic], or Oklahoma "sweet" crude. The evidence indicated that about half of the oil delivered under the contract, approximately 117,250 barrels, was actually fuel oil. Additionally, in reliance on the designation of the oil purchased from Compton Petroleum as crude, Apco filed tallies of the amount of crude oil that it believed it was refining with the Federal Energy Administration, in compliance with government regulations. These incorrect figures were used by the FEA in establishing the national averages of tier categories of oil refined each month for purposes of equalizing the cost of crude oil under its entitlements program.

Compton Petroleum and Billy G. Young, the Appellant, were charged by indictment with eleven counts of mail fraud under 18 U.S.C. § 1341, three

counts of willfully and knowingly making false statements to a government agency under 18 U.S.C. § 1001, one count of interstate transportation of stolen property under 18 U.S.C. § 2314, and were also charged with aiding and abetting in the commission of all fifteen counts under 18 U.S.C. § 2. A plea of *nolo contendere* was accepted from Compton Petroleum on the entire indictment and a fine was imposed. Young was tried before a jury in the Western District of Oklahoma. At the close of evidence, Count Ten of the Indictment, alleging mail fraud, was dismissed. Subsequently, the jury returned a verdict of guilty on the mail fraud and false statement charges. The Appellant was acquitted of interstate transportation of stolen property. On appeal, Appellant argues that the trial court erred in admitting statements made out of court by a person no longer living at the time of trial. It is further contended that the Appellant was unfairly prejudiced by remarks made during closing rebuttal argument by the prosecutor.

During the course of the trial, statements made out of Court by Homer Reves, the chief accountant and office manager at Compton Petroleum during the period that the alleged criminal activity took place, were received as evidence, despite the fact that Homer Reves had died more than three years prior to trial. These were statements Reves had made to accountants working under him, which the Government claims were properly admitted as admissions of an agent of a party opponent under Fed. R. Evid. 801(d)(2)(D). Appellant contends that there is no indication that Homer Reves was his employee or agent and that the Court improperly considered Reves as such simply because the Appellant, as vice-president

of Compton Petroleum, was higher in the corporate chain of authority.

Ordinarily the statement of an accountant made regarding his employment with a party will not be considered hearsay under Rule 801(d)(2)(D), even in a criminal case. *United States* v. *Diez*, 515 F.2d 892, n. 4 (5th Cir. 1975); *Hayes* v. *United States*, 407 F.2d 189 (5th Cir. 1969). The fact that the statement was made by a corporate employee to another corporate employee, rather than to a third party, would not preclude the admission of that statement against the corporation under Rule 801(d)(2)(D). *Mahlandt* v. *Wild Canid Survival & Research Center, Inc.*, 588 F.2d 626 (8th Cir. 1978). However, when such a statement is offered against another corporate employee, instead of the corporation, proper admission under Rule 801(d)(2)(D) will necessarily depend on the nature of the relationship between the declarant and the defendant. *United States* v. *Pacelli*, 491 F.2d 1108 (2d Cir. 1974), cert. denied, 419 U.S. 826; *United States* v. *Coppola*, 479 F.2d 1153 (10th Cir. 1973).

Obviously, expanding the rule to include statements made by any person who is subordinate to a party opponent may create a loophole in the hearsay rule through which evidence not contemplated by the authors of Rule 801 could be admitted. On the other hand, if the factors which normally make up an agency relationship are present, the evidence should not be excluded simply because the statement is offered against a corporate officer, rather than the corporation. Here the prosecution inquired into the relationship between Billy Young and Homer Reves on examination of the two accountants who worked

under the deceased declarant during the period in question. Johnnie Milton Huff testified as follows:

Q. Allright, sir. Who was your boss at Compton Corporation?

A. I worked primarily for Bill Young.

Q. And who made the decisions at Compton Corporation so far as you knew?

A. So far as I knew making contract negotiations Bill did that. Bill was in charge of the operations. (Tr. 201.)

Lennox K. Bird also worked as an accountant under Mr. Reves. He testified as follows:

Q. Who told you what to do?

A. Homer Reeves.

Q. And who old Homer Reeves what to do?

A. After—well, that would come from Bill Young.

Q. All right. And is that Mr. Young seated over here in the gray suit?

A. Yes.

Q. All right. May the record show he's identified Mr. Young. How about Mr. White, did Mr. White visit the site at Abilene to tell you or Mr. Reeves what to do or anyone that you ever saw? Did you ever see him telling anyone what to do down there?

A. Not to the best of my knowledge, no.

* * * * *

Q. Who told you what to do during Mr. White's presidency?

A. Well, again I worked for Homer Reves directly.

Q. Yes, sir.
A. And that's where I received my orders up until his demise.
Q. Yes sir. And who gave Mr. Reves his directions during Mr. White's presidency?
A. Again, he was under Mr. Young.

This evidence was sufficient to establish an agency relationship between Mr. Young and Mr. Reves for purposes of admitting the statements under Rule 801 (d) (2) (D). The testimony was therefore not hearsay and was properly admitted.

Despite the evidentiary propriety of the admission of statements made by Homer Reves, there remains the issue of whether the receipt of such testimony deprived the Appellant of his Sixth Amendment right to confront witnesses testifying against him. The inability to cross-examine a declarant attains particular significance in light of the fact that declarations admitted under Rule 801(d) are defined out of the hearsay rule as a matter of estoppel, as opposed to being excepted from the rule as independently reliable statements. See *United States* v. *Porter*, 544 F.2d 936 (8th Cir. 1976); *United States* v. *Robinson*, 546 F.2d 309 (9th Cir. 1976), cert. denied, 430 U.S. 918; Louisell and Mueller, *Federal Evidence*, § 423.

The general rule applied in such situations comes from *Ohio* v. *Roberts*, 448 U.S. 56 (1980), which involved testimony taken at a preliminary hearing on direct examination by the Defendant's attorney and admitted at trial after attempts to find the same witness failed. The court noted that, once it is shown that a witness is not available, "the Clause countenances only hearsay marked with such trustworthiness" which will guarantee "no material departure

from the reason of the general rule." Justice Blackmun stated the majority position:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in cases where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness. 448 U.S. at 66.

A review of the case law on this issue indicates that a case-by-case analysis of the circumstances under which such testimony is offered is required. See *Dutton* v. *Evans*, 400 U.S. 74 (1970); *United States* v. *Scholle*, 553 F.2d 1109 (8th Cir. 1977); cert. denied, 434 U.S. 940.

In a case with facts similar to this, it was held that statements made by a witness who died prior to trial would be admissible under Rule 801(d) (2) (A), (B), and (E). Regarding the applicability of the Confrontation Clause, the court relied on the criteria set forth in *United States* v. *Scholle*, 553 F.2d 1109 (8th Cir. 1977), cert. denied, 434 U.S. 940:

> A highly relevant consideration is the degree of prejudice imposed upon the fact-finding process by the declarant's nonavailability. We should consider whether the out-of-court statement bears traditional indicia of reliability, whether it was crucial to the government's case, whether the jury had an opportunity to weigh the credibility of the extrajudicial statement, and whether ap-

> propriate instructions were given by the trial judge. 553 F.2d at 1119 (Citations omitted).

Other factors considered in *Scholle* included whether the context of the statement and the identity of the person spoken to bolstered the reliability of the statement. Any motive that the declarant might have had for lying when the out-of-court statement is made is also relevant. Finally, any indication of a failure of memory, perception, or expression should be taken into account.

Here, it is significant that the two witnesses who had worked under the direction of Homer Reves testified to essentially the same thing. The context in which the statements were made and the parties to which they were addressed were properly set forth. Neither of the witnesses had any reason not to tell the truth about what had been said to them. The statements were made in the context of the manner in which Compton Petroleum was performing under its contract with the buyer of the oil and were not bold assertions that fraud was being committed. All of this would lend to their reliability. Also, an examination of the record indicates that no less than five other witnesses testified as to the impropriety of the Appellant's conduct. Thus, the challenged statements were cumulative upon a substantial body of evidence tending to prove the same point. This goes far in mitigating any prejudice which might have accrued to the Appellant. Finally, the jury was properly instructed regarding their prerogative to assess the credibility of the witnesses before them and the weight with which any particular testimony may be considered. These factors, taken as a whole, indicate that the Appellant's Sixth Amendment right to confront witnesses testifying against him was not abrogated by the admission of the statements of the deceased accountant.

During his final argument to the jury, the prosecutor made several statements regarding his personal opinion of Mr. Young's guilt. He also made one incorrect reference to the amount by which the Appellant was said to have profited from the activities for which he was indicted. Although no objection was entered by counsel for the Appellant at the time the remarks were made, it is still argued that the prosecutor's conduct substantially prejudiced the Appellant at trial. A review of the trial transcript shows that the prosecutor did indeed put his personal beliefs at issue, as the following statements indicate:

> I think he said that not anyone sitting at this table thinks that Mr. Young intended to defraud Apco. Well, I was sitting there and I think he was. I think he got 85 cents a barrel for every one of those 117,250.91 barrels he hauled and every bit of the money they made on that he got one percent of. So, I think he did. If we are allowed to give our personal impressions since it was asked of me.
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> • • • • •
>
> I don't know what you call that, I call it fraud. You can look at the evidence and you can remember what they said and what he admitted they said. I think it's a fraud.
>
> • • • • •
>
> He said—Mr. Bailey said Apco didn't lose, says doesn't think anyone will come back. Well, what he thinks they won't come back but my experience in these matters is when the government does something like this they're going to come

back. All that money that Apco got for this stripper and new oil, Al Green at the Apco trust he's going to get some kind of invoices. That's what I think.

* * * * *

I don't know whether you call it honor and integrity, I don't call it that, Mr. Bailey does. If you feel you should acquit him for that it's your pleasure. I don't think you're doing your job as jurors in finding facts as opposed to the law that this Judge is going to instruct you, you think that's honor and integrity then stand up here in Oklahoma courtroom and say that's honor and integrity; I don't believe it.

These portions of the transcript speak for themselves. The prosecutor repeatedly stated his opinion regarding the Appellant's intent to defraud, the likelihood of future prosecutorial action against one other party involved in the scheme, and the duty of the jurors to find the Appellant guilty. The issue has come before this Court enough times in recent years to establish beyond cavil that such statements constitute prosecutorial misconduct. *United States* v. *Rios*, 611 F.2d 1335 (10th Cir. 1975); *United States* v. *Latimer*, 511 F.2d 498 (10th Cir. 1975); *United States* v. *Coppola*, 479 F.2d 1153 (10th Cir. 1973); *United States* v. *Ludwig*, 508 F.2d 140 (10th Cir. 1974).

Considering the position of this Court on the issue of prejudicial statements made by the prosecution during argument to the jury, the above-quoted remarks were sufficiently egregious as to constitute plain error. Thus, the failure of Mr. Young's counsel to enter an objection at the time they were made is not fatal to this appeal. *United States* v. *Ludwig*,

supra. The Government argues that the prosecutor's comments were merely a reply to the defense counsel's assertion during his closing argument that no one at the prosecutor's table really believed that the defendant had the intent to defraud. Yet, the rule is clear in this Circuit that improper conduct on the part of opposing counsel should be met with an objection to the court, not a similarly improper response. As stated in *United States* v. *Ludwig*, *supra*:

> The government concedes error in this emphatic and personalized vouching for the integrity of the state police but urges us to hold the error to be harmless in view of numerous complaints directed against defense counsel's own conduct. We can give no comfort to the proposition that unprofessional conduct upon the part of defense counsel opens the door to similar conduct by government counsel. 508 F.2d at 143.

See also *United States* v. *Rios*, *supra*, *United States* v. *Latimer*, *supra*.

In accordance with the foregoing, the judgment and conviction must be and hereby are reversed and remanded for a new trial.

Judge McWilliams dissents.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MAY TERM—June 20, 1983

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable William E. Doyle, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Court Judges, and Honorable Clarence A. Brimmer, Jr.*

No. 81-1536

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

BILLY G. YOUNG, DEFENDANT-APPELLANT

This matter comes on for consideration of appellee's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by Judges Seth and Brimmer, to whom the case was submitted. Judge McWilliams, also on the panel, voted to grant rehearing.

The petition for rehearing having been denied by the panel to whom the case was submitted and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of

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* District Court Judge of the United States District Court for the District of Wyoming, sitting by designation.

Appellate Procedure, the suggestion for rehearing in banc is denied.

HOWARD K. PHILLIPS
Clerk

By /s/ Robert L. Hoecker
ROBERT L. HOECKER
Chief Deputy Clerk

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